United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1155

No. 76-1155

In the

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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IN RE APPLICATION OF THE UNITED STATES OF AMERICA IN THE MATTER OF AN ORDER AUTHORIZING THE USE OF A PEN REGISTER OR SIMILAR MECHANICAL DEVICE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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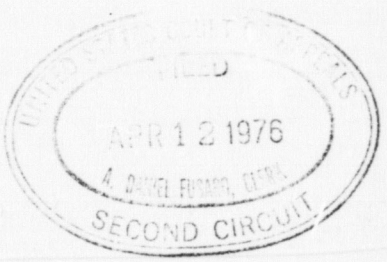
BRIEF OF NEW YORK TELEPHONE COMPANY MOVANT-APPELLANT



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Preliminary Statement

New York Telephone Company (Appellant) appeals from an Order of the United States District Court for the Southern District of New York, Tenney, J., dated April 2, 1976, which denied Appellant's motion to vacate or modify a March 19, 1976 Order of the District Court directing Appellant to furnish information, facilities and technical assistance to Federal law-enforcement officials in the installation and operation of a pen register (or similar mechanical device) on certain telephone numbers in New York City in connection with an investigation of organized gambling.

Statement of Facts

On March 19, 1976, an Order was issued by the United States District Court (S.D.N.Y.), Tenney, J., directing Appellant and its employees to furnish information, facilities and technical assistance to Federal law-enforcement officials in connection with the installation and operation of a mechanical device known as a pen register. The Order was not issued pursuant to the provisions of Title III (18 USC § 2510 et. seq.). A copy of this Order is appended hereto as Exhibit "A."

Appellant declined to furnish lease lines or technical assistance pending further judicial consideration since Appellant questioned the legal authority of the

District Court to issue said order outside of the provisions of Title III. On March 30, 1976, Appellant filed a motion brought on by Order to Show Cause seeking to vacate or modify the March 19, 1976 order. Judge Tenney denied, in all respects, Appellant's motion to vacate or modify that order, whereupon Appellant appealed to this Court and moved for a stay pending appeal. Appellant's Motion to Stay was denied, but the Court sua sponte granted an expedited appeal.

While the March 19, 1976 order authorized the use of a pen register for only 20 days from the date of the order, it has been renewed for an additional 20 days by an order dated April 9, 1976. The issue is ripe for appeal. During the oral argument on Appellant's Motion to Stay, both parties agreed that since an important question of law was involved, which was likely to recur, the issue would not be mooted by expiration of the original order.

Issues Presented

1. Does the District Court have the authority outside of the provisions of Title III to direct Appellant to affirmatively participate with Federal law enforcement in placing a pen register.

2. Does the District Court have the authority outside of provisions of Title III to authorize Federal law enforcement to utilize a pen register.

THE COURT BELOW ERRED IN HOLDING THAT IT HAD INHERENT POWER TO DIRECT APPELLANT TO AFFIRMATIVELY PARTICIPATE IN PLACING A PEN REGISTER

At the outset is should be stated that the authority for the District Court to authorize the use of a pen register outside of the statutory safeguards contained in Title III of the Omnibus Crime Control and Safe Streets Act of 1968 §§ 2510, et. seq., is not at all clear. Appellant has serious reservations whether such authority exists and will address that point, infra. However, the Court need not reach that question because even assuming, for the sake of argument, that some kind of inherent authority does exist in the District Court to enter an order authorizing the Government to do what it requested here, the Court had no authority to require Appellant, a private party, to affirmatively participate by providing lines connected to those of the designated subscribers.

The authority of a District Court to order a telephone company to provide leased lines was first raised in the Court of Appeals for the Ninth Circuit in the case of Application of the United States, 427 F2d 639 (9th Cir. 1970). The Court expressly rejected the concept of inherent authority which the Government is urging here and adopted by the Court below. In that case the Government had obtained a valid wiretap order pursuant to Title III. This was prior to the amendment of 18 U.S.C. 2511(a)(ii), § 2518(4) and § 2520 which authorize and direct

telephone companies and their employees to provide assistance to law enforcement in the execution of valid wire-tap orders under Title III and further granted immunity from both criminal and civil liability. The Government made precisely the same arguments to the Ninth Circuit as it is making here. As stated by the court:

> "The Government acknowledges that Title III of the Act contains no specific provision conferring such a power. It argues, however, that this is not dispositive. The power to compel the cooperation of the telephone company, the Government urges, must be the concomitant of the power to authorize the interception for without the former the latter is worthless. . . . The Government argues that, implicit in these findings is the conclusion that a corporation or a person ought not to be permitted to 'negate' the overriding legislative purpose and that the authorizing court must have the power to insure the effective execution of its orders." (p. 642)

The Circuit Court rejected the Government's contentions holding.

> "We are not convinced that the authority which the Government would have the court exercise, to compel a telephone company to assist in the investigation of suspected law violators can be derived, by analogy, from the power law enforcement officers may have to assemble a posse comitatus to keep the peace and to pursue and arrest law violators. Nor do we find, outside Title III, any district court authority, statutory or inherent for entry of such an order. We think the district court correctly decided that it was without power to grant the relief requested. If the Government must have the right to compel regulated communications carriers or others to provide such assistance, it should address its plea to Congress." (p.644, emphasis added)

The Government did apply to Congress for such express statutory authority and Congress amended Title III to provide for such assistance as follows:

> "It shall not be unlawful under this chapter for an officer, employee, or agent of any communication common carrier to provide information, facilities, or technical assistance to an investigative or law enforcement officer who, pursuant to this chapter [18 USCS §§ 2510-2520], is authorized to intercept a wire or oral communication." 18 USC 2511 (2a)(ii) (emphasis added)

Congress amended 18 USC 2518 to empower District Courts to direct such assistance and further amended 18 USC § 2520 to provide immunity from civil and criminal liability for those who provide such assistance.

This authorization of affirmative assistance and civil and criminal immunity is applicable only in connection with an order issued pursuant to Title III. The Government admits, and Judge Tenney so found, that the order at issue here was not obtained pursuant to Title III. The clear intent of Congress, as shown by the amendments set forth above, was to authorize assistance on the part of telephone company personnel, to empower District Courts to direct that such assistance be provided, and to grant immunity for such assistance, but only in connection with a Title III order. Since the order at issue here is not a Title III order, the holding of the Ninth Circuit Court of Appeals In Application of the United States, supra, is still applicable. The Court had no inherent jurisdiction to direct Appellant or its employees to affirmatively participate in the placing of the pen register at issue here.

Contrary to the holding of the Ninth Circuit, the Court below attempts to find authority in the All Writs Act which provides that federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." (28 USC § 1651(a)) However, the rule is well established that the All Writs Act is not an independent source of jurisdiction. As the Seventh Circuit Court of Appeals held in interpreting the All Writs Act:

> "This provision does not enlarge or expand the jurisdiction of the courts but merely confers ancillary jurisdiction where jurisdiction is otherwise granted and lodged in the court. . . . The statute presupposes existing complete jurisdiction and does not contain a new grant of judicial power. United States v. First Fed. S. & L. Ass'n, 248 F2d 804, 808-09 (7th Cir. 1957), cert. denied 355 U.S. 957 (1958)."

See also Brittingham v. United States Commissioner of Internal Revenue, 451 F2d 315 (5th Cir. 1971) where the court stated:

> "It is settled that this section known as the All Writs Act, by itself, creates no jurisdiction in the district courts. It empowers them only to issue writs in aid of jurisdiction previously acquired on some other independent ground."(451 F2d at 317)

Thus, it is clear that the reliance of the Court below on the All Writs Act for authority to direct the telephone company to affirmatively participate in the authorized surveillance is misplaced. Congress, by the express statutory language cited above, has authorized and directed the cooperation of Appellant and its employees only in connection with wiretap

orders issued pursuant to Title III. If statutory authorization was required in the Title III situations for which it was secured, it is a fortiori required when some doubtful "inherent" authority is claimed as here. As the Ninth Circuit Court said in Application of the United States, supra: "If the Government must have the right to compel regulated communications carriers or others to provide such assistance, it should address its plea to Congress." (p. 644)

In United States v. Illinois Bell Telephone Company, No. 75-1909 (7th Cir. Feb. 23, 1976), the Court of Appeals for the Seventh Circuit, in asserting it had the inherent authority under the All Writs Act to compel the telephone company to participate in placing a pen register, stated that in its view the Congressional action amending 18 USC § 2511 (2a)(ii) and § 2520 was a recognition that the federal courts had inherent jurisdiction to require such active participation. Appellant respectfully submits that such an interpretation is plainly contrary to the chain of events and the language used in the amendment to Title III. As stated above, the Ninth Circuit in Application of the United States, supra, held that federal courts have no such inherent authority. Shortly thereafter, Congress at the request of the Government, amended Title III to provide that it shall not be unlawful for an officer, employee or agent of a common carrier to provide assistance to a law enforcement officer who "pursuant to this chapter is authorized to intercept a wire or oral

communication." From the plain language of the statute, it is clear that Congress intended to authorize active participation on the part of telephone company employees only in connection with orders issued under Title III in recognition of the holding of the Ninth Circuit. It could have gone further, but did not. In situations where it has not legislated, no such power exists.

As set forth above, the amendments to Title III authorizing the assistance of Appellant and its employees in connection with Title III orders cannot supply the statutory basis for the Court's authority. It also is obvious that the All Writs Act does not provide jurisdiction over Appellant and its employees for such an order. No other statutory authority has been cited either by the Government or the Court below. Thus, it is clear that the Court, in ordering Appellant and its employees to affirmatively cooperate with law enforcement officials in placing the pen register at issue here, has exceeded its authority and the order to that extent is invalid.

Appellant's position in this matter is not dictated by any desire to frustrate the legitimate needs of law enforcement. Rather its position is based on a very real concern that compliance with the Court's order could expose Appellant and its employees to possible civil or criminal liability. The provisions of the Communications Act (47 U.S.C. § 605),

as amended, require that Appellant safeguard the privacy of all communications including their very existence. If Appellant is correct and the Court below has no authority to require Appellant's affirmative assistance, the order at issue here is invalid on its face and Appellant's cooperation with the Government conceivably could expose Appellant and its employees to civil liability under 47 U.S.C. § 206 and criminal liability under 47 U.S.C. § 501. Certain actions are pending currently in other jurisdictions wherein it is contended that affiliates of Appellant acted unlawfully albeit the telephone company believed it was proceeding on the basis of a "demand of lawful authority." This concern is heightened by Appellant's belief, as discussed below, that the district court has no authority to issue an order authorizing law enforcement to utilize a pen register except under the provisions of Title III.

IT IS DOUBTFUL THAT THE DISTRICT COURT HAS THE AUTHORITY TO ISSUE AN ORDER AUTHORIZING LAW ENFORCEMENT TO UTILIZE A PEN REGISTER EXCEPT PURSUANT TO THE PROVISIONS OF TITLE III

In addressing the Court below, Appellant concentrated on the authority of the District Court to require it to affirmatively participate in a criminal investigation. If this Court agrees with Appellant that the District Court has no authority to compel affirmative action on the part of Appellant and its employees, the issue set forth above need not be reached. However, Appellant seriously doubts the authority, statutory or inherent, of the Court below to authorize the use of a pen register by law enforcement and investigative agencies, except in conjunction with an order under the very carefully drawn provisions of Title III. Appellant's belief that this was not Congress' intent is buttressed by the evolving capabilities of a modern pen register. As the Court of Appeals for the Fifth Circuit pointed out:

> "A pen register is a mechanical device attached to a given telephone line and usually installed at a central telephone facility. It records on a paper tape all numbers dialed from that line. It does not identify the telephone numbers from which incoming calls originated, nor does it reveal whether the call, either incoming or outgoing, was completed. Its use does not involve any monitoring of telephone conversations. . . . Notwithstanding the apparent sterility of a pen register implied by this definition, the expert testimony below indicated that once a pen register has been installed, a full wiretap 'interception' of telephone conversation may be accomplished simply by attaching headphones or a tape recorder to the appropriate terminal on the pen register unit. In Re Joyce, 506 F2d 373 at 377 (5th Cir. 1975)"

It is difficult for Appellant to believe that Congress, when it enacted Title III, the comprehensive statutory scheme setting forth the stringent guidelines under which duly authorized law-enforcement officials could engage in electronic surveillance, meant to exclude this form of electronic surveillance with its inherent dangers for abuse.

There is no express statutory authority outside of Title III which authorizes the use of a pen register by law enforcement and investigative agencies. The United States District Court for the Western District of Missouri in the case of In Re Application of the United States, 44 Law Week 2367, January 19, 1976*, where the Court was presented with an application by Federal law-enforcement officials for a non-Title III Court order authorizing the use of a pen register, held, after a thorough review of the applicable statutes and case law, that it had no jurisdiction to issue such an order. The Court stated:

> "We do not, however, have a Title III application before us. What we do have before us is an application for some sort of an ad hoc authorization of the use of a pen register device in connection with an investigation of a possible violation of a statute which the Congress refused to include within the coverage of Title III. Indeed, we have an application which the government concedes is outside the coverage of Title III. The government's basic position in connection with its application is that in spite of the fact that the Congress did not include violations of §§ 7203 and 7262, Title 26, U.S.C., requiring the payment

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*Inasmuch as the full opinion has not as yet been published, a reproduced copy thereof is attached hereto as Exhibit B.

> of a $500 special tax under the Federal Wagering Laws, within the coverage of Title III, the ancient All Writs Act nevertheless must be said to vest power and jurisdiction in a district court to design ad hoc procedures to authorize electronic surveillance in the form of the installation of a pen register device in connection with investigations of alleged violations of §§ 7203 and 7262. Indeed, the government's All Writs Act argument, if extended to its logical conclusion, would support the notion that all district courts have power and jurisdiction to authorize the use of pen register devices in connection with any investigation of any violation of the laws of the United States, regardless of the fact that the Congress may not have included the particular offense within the coverage of Title III."* (pp. 8-9 of the attached opinion)

The Court below, in reaching the contrary conclusion that it had such authority to issue an order for a pen register outside of Title III, relied upon U.S. v. Illinois Bell Telephone Company, supra and the dissenting minority opinion of Mr. Justice Powell in U.S. v. Giordano 416 U.S. 505 (1974). Mr. Justice Powell in the Giordano case by way of dictum stated:

> "Because a pen register is not subject to the provisions of Title III the permissibility of its use by law enforcement authorities depends entirely on compliance with the constitutional requirements of the Fourth Amendment." (pp. 553-554)

The Seventh Circuit in Illinois Bell held that its authority under Mr. Justice Powell's rationale was "akin" to that given the Court by Rule 41 of the Federal Rules of Criminal Procedure. Although the Court noted that Rule 41

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*Appellant is informed that Notice of Appeal to the Court of Appeals for the Eighth Circuit has been filed.

dealt with the search and seizure of tangible objects, it stated that a "common sense approach" dictated that the Court had authority akin to that under Rule 41 to authorize use of investigative techniques which the court conceded are "non-tangibles." This, of course, is an admission that Rule 41 itself does not support the issuance of the order in question.

Rule 41 governs the issuance of search warrants, and its purpose is to carry out the mandate of the Fourth Amendment. The Court below cannot rely on Rule 41 as authority for an order which does not come within its terms. As the Fifth Circuit stated:

> "The Rules of Criminal Procedure are not merely admonitory. They have the force of law. See United States v. Virginia Erection Corp., 4 Cir. 1964, 335 F2d 868; 18 U.S.C. § 3771. . .The purpose of Rule 41 is to carry out the mandate of the fourth amendment. It binds federal courts and federal law enforcement officers." Navarro v. U.S., 400 F2d 316, p. 318 (5th Cir. 1968)

Relying on Rule 41 as a basis for issuing an order authorizing a pen register is untenable since the Rule clearly provides for the search and seizure of "property" which is defined to include "documents, books, papers, and other tangible objects." (F.R. Cr. P. 41(h)) Electronic pulses or tones sought and seized by a pen register are not tangible objects within the meaning of Rule 41.

The self-evident meaning of the word "property" as used in Rule 41 was recently affirmed by this Court in In Re Grand Jury Subpoena of Fred Vigorito, 499 F2d 1351 (2d Cir. 1974), cert. denied. 419 U.S. 1056 (1974). There appellees sought to suppress and recover evidence of their conversations secretly recorded by Government agents pursuant to Court order. They argued, inter alia, that they were entitled to return of their taped conversations under Rule 41(e) which provides that a person aggrieved by an illegal seizure under Section 41 may move for the return of his property. The Court held:

> "The appellees' alternate motion for the suppression and return of their conversations under Rule 41(e) has no basis in the text of the Rule. In Bova v. United States, 460 F2d 404 (2d Cir. 1972), we held, albeit in the context of our appellate jurisdiction, that telephone conversations are not 'property' as that term is used in Rule 41(e). We see no reason to apply a different standard in this case. Decisions urged upon us by the appellees which extend the protection of the Fourth Amendment to governmental seizures of intangibles, compare Katz v. United States, 389 U.S. 347, 353, 88 S.Ct. 507, 19 L.Ed. 2d 576 (1967), with Olmstead v. United States, 277 U.S. 438, 457, 466, 48 S.Ct. 564, 72 L.Ed. 944 (1928), are not relevant to the narrow issue of what constitutes 'property' as that term is used in Rule 41(e)." (pp. 1354-1355)

It is apparent that if telephone conversations are not "property" under Rule 41, an order directing the electronic recording of the dial impulse of telephone calls which disclose the existence of such conversations is not a seizure of "property" contemplated under Rule 41. Furthermore, in addition to the requirement of tangible property as the object of the search, Rule 41 provides for an inventory of the items seized, and for execution and return within ten days. Obviously, the procedure adopted in this case does not comply with the mandate of Rule 41. The Seventh Circuit opinion, U.S. v. Illinois Bell, supra, as well as the Court below, recognize that the Order for a pen register cannot fall within the authority of Rule 41. However, by some magical formula, jurisdiction is founded not on some other statutory basis but on a "common sense approach" (p. 7, J. Tenney's opinion). It is respectfully submitted that jurisdiction to issue an Order for a pen register outside the narrow strictures of Title III must be found within the provisions of Rule 41 or else the Court does not possess it. Jurisdiction may not be created by analogy - by use of such terms as "in the nature of," or "akin to."

The statement of Mr. Justice Powell in his minority decision in United States v. Giordano, supra, was dicta since the authorization of a pen register independent of a Title III wiretap order was not an issue in that case. In Giordano,

the majority affirmed the inadmissibility of evidence obtained through an otherwise lawful Title III wiretap because the letters authorizing the application by the Government for the wiretap order had been signed by someone other than the Attorney General or an Assistant Attorney General specifically designed by the Attorney General, and thus the order was in violation of 18 U.S.C. § 2516(1). Mr. Justice White, speaking for the majority stated:

> "The Act is not as clear in some respects as it might be, but it is at once apparent that it not only limits the crimes for which intercept authority may be obtained but also imposes important preconditions to obtaining any intercept authority at all. Congress legislated in considerable detail in providing for applications and orders authorizing wiretapping and evinced the clear intent to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications." (416 U.S., p. 515)

In view of the Congressional concern as stated above by the majority, and in the absence of any statutory authority, Appellant does not believe that Congress intended to authorize law enforcement to use pen registers, with their inherent capabilities for wiretapping, except pursuant to, or in conjunction with, a Title III order. The Missouri District Court pointed out In Re Application of United States, supra, that such an interpretation would effectively authorize the use of a pen register device

in connection with any investigation of any violation of the laws of the United States and without the personal attention of the high level official of the Justice Department specified in Title III.

Along with the dictum of Mr. Justice Powell, both the Seventh Circuit and the Court below place heavy reliance on the following cryptic statement from the legislative history of Title III:

> "The proposed legislation is not designed to prevent the tracing of phone calls. The use of a 'pen register,' for example, would be permissible. But see U.S. v. Dote, 371 F2d 176 (7th Cir. 1966)." S.Rep. No. 1097 90th Cong. 2nd Sess., 90 (1968)

Appellant respectfully submits that it is not at all clear that the language quoted above indicates Congressional intent that law enforcement officials would be able to obtain authorization for the use of a pen register except in conjunction with an order issued under the statutory framework of Title III. Given the lack of any express authority for law enforcement and investigative agencies to obtain such an order outside of Title III, it is reasonable to conclude that Congress, in using the language quoted above, was referring to its intent that pen registers would be exempt from the provisions of Title III when utilized by telephone companies in the ordinary course of business. This interpretation is buttressed by reference to the Dote Case cited.

In Dote, a telephone company informed the Internal Revenue Service that it suspected a certain telephone was being used for bookmaking and, at the request of the IRS, installed a pen register. The company turned over to the IRS the results of the pen register without having been served with a subpoena or other judicial process. The Court held that while pen registers serve an important function in telephone company internal operations, and, therefore, their use was permissible, the release of the pen register results in that case without a subpoena was a violation of § 605 of the Communications Act (47 U.S.C. § 605). Thus, the statement in the legislative history that a pen register would be permissible, with the warning that the holding of Dote should be noted, may well only indicate that Congress was aware telephone companies used pen registers in the ordinary course of business, and a recognition that they could continue to do so as long as they did not become an arm of law enforcement outside the provisions of Title III, as in the Dote case. Such an interpretation of the legislative history quoted above is clearly more consistent with the thrust of Title III than one that implies that Congress intended to authorize law enforcement agencies to use pen registers for investigative purposes outside of the strict requirements set forth in Title III.

As additional precedent for its authority to issue the order in question, the Court below cited: United States v. Illinois Bell Telephone Co., supra, United States v. Clegg, 509 F2d 605, 610 (5th Cir. 1975); United States v. Falcone, 505 F2d 478, 482 (3d Cir. 1974), cert. denied, 420 U.S. 955 (1975); United States v. Finn, 502 F2d 939, 942 (7th Cir. 1974); United States v. Brick, 502 F2d 219, 223 (8th Cir. 1974); Korman v. United States, 486 F2d 926, 931 (7th Cir. 1973); United States v. King, 335 F. Supp. 523 (S.D. Cal. 1971), aff'd in part, rev'd in part on other grounds, 478 F2d 494 (9th Cir. 1973), cert. denied, 417 U.S. 920 (1974); United States v. Vega, 52 F.R.D. 503 (E.D.N.Y. 1971).

With the exception of U.S. v. Illinois Bell, the cited cases do not address the issue of the Court's authority to authorize the use of a pen register outside of Title III. The Finn, Brick, Falcone and King cases all involved a Title III Court-ordered wiretap. The Clegg case upheld the right of a telephone company to use a pen register to detect toll fraud. The Korman case held that pen registers were no longer governed by 47 USC 605 and the Vega case dealt with a Court-ordered wiretap under a state statute similar to Title III. Thus, these cases do not hold that a Court order for a pen register may be issued outside of the provisions of Title III.

It is true that the Seventh Circuit, as set forth above, had determined that District Courts have authority to issue such orders outside of the strictures of Title III, but we believe in so doing it clearly erred as we have discussed herein. We wish to inform the Court that this matter is sub judice in the Court of Appeals for the Fifth Circuit in the case of Southern Bell v. United States, No. 74-3357 argued Feb. 10, 1976, and apparently soon will be in the Court of Appeals for the Eighth Circuit in the appeal from the decision in the matter of the Application of the United States, supra.

Conclusion

We respectfully submit that it is clear that the Court below has no authority, statutory or inherent, to direct Appellant and its employees to actively participate with a law enforcement agency in the placing and maintaining of a pen register. We further submit it is highly doubtful that the Court has any authority, statutory or inherent, to issue the basic order at issue herein, i.e., to authorize law enforcement to use pen registers outside of the strict

standards set forth in Title III. For these reasons, the order below exceeds the Court's jurisdiction and should be reversed.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

APPLICATION OF THE UNITED STATES OF AMERICA IN THE MATTER OF AN ORDER AUTHORIZING THE USE OF A PEN REGISTER OR SIMILAR MECHANICAL DEVICE

Misc. No. 19-97(44)

ORDER

AUTHORIZING USE OF A PEN REGISTER

TO: Special Agents of the Federal Bureau of Investigation, United States Department of Justice

Affidavit having been made before me by Walter F. Smith, Special Agent of the Federal Bureau of Investigation, United States Department of Justice, and full consideration having been given to the matter set forth therein the court finds:

(a) there is probable cause for belief that

), and others as yet unknown have committed, are committing, and will continue to commit offenses listed in Section 2516 of Title 18, United States Code, involving the use of facilities in interstate commerce in order to promote, manage, establish and carry on an unlawful activity, to wit: a gambling enterprise in violation of Section 1952 of Title 18, United States Code, and are conspiring to commit such an offense in violation of Section 371 of Title 18, United States Code;

(b) there is probable cause to believe that the telephones subscribed to by and located at

EXHIBIT A

telephone numbers and have been, are being, and will continue to be used by Unknown), and others as yet unknown in commission of the above described offenses.

WHEREFORE, it is hereby ordered that the New York Telephone Company, a communication carrier as defined in Section 2510 (10) of Title 18, United States Code, shall furnish the applicant forthwith all information, facilities and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the service that such carrier is according the person whose communications are to be intercepted, the furnishing of such facilities or technical assistance by the New York Telephone Company to be compensated for by the applicant at the prevailing rates.

WHEREFORE, it is further ordered that Special Agents of the Federal Bureau of Investigation, United States Department of Justice, are authorized to:

(a) install mechanical devices on the telephones subscribed to by and located at New York, New York, and bearing telephone numbers and which telephones have been, are being, and will continue to be used at said address.

(b) operate such mechanical device until the telephone numbers of all outgoing calls dialed lead to the identities of the associates and

, and their places of operation, or for a period of twenty (20) days from the date of this Order, whichever is earlier.

Provided that the operation of this device must terminate upon attainment of the authorized objective, or in any event, at the end of twenty (20) days from the date of this Order.

Dated: March 19, 1976

S/C Charles H Tenney

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

IN THE MATTER OF THE APPLICATION	
OF THE UNITED STATES OF AMERICA	1/19/76
FOR AN ORDER AUTHORIZING USE OF	Misc. No. 75 PR 1
A PEN REGISTER DEVICE	44 U.S. Law Week 2367 (February 17, 1976)

MEMORANDUM OPINION AND ORDERS

I.

This case pends on the second application made by a Special Attorney of the Organized Crime and Racketeering Section, Kansas City Field Office, Department of Justice, for an order authorizing the use of a pen register device on five particular telephones used by three named individuals, and others yet unknown, located in Kansas City, Missouri. The second application, as did the first application, also prays for an order authorizing the Southwestern Bell Telephone Company to furnish the applicant all necessary assistance to install the pen register.[1] The pending application is based solely upon and purports to invoke power allegedly granted this Court under the All Writs Act, 28 U.S.C. § 1651. As will be later developed in detail, the government has unsuccessfully attempted to invoke other sources of power and jurisdiction in support of its requested orders in an unsuccessful intervening application which it presented to the Chief Magistrate of this Court.

EXHIBIT B

Included in the papers presently before the Court is the government's memorandum of December 1, 1975 and suggestions in support of application for the orders authorizing use of a pen register device. That memorandum and another paper entitled "Government's Filing Under Seal of a Certain Matter Concerning the Use of a Pen Register Device and Suggestions Attached Thereto" purports to state the procedural steps which the Special Attorney has taken in connection with the three applications filed for its requested orders.

Any implication which may appear in those papers, however, that this Court may have suggested that the government present a Rule 41, Federal Rules of Criminal Procedure, application to Chief Magistrate Calvin K. Hamilton for orders similar to those requested in the pending application is inaccurate. The files and records of this Court establish the following sequence of events. The government's first attempt to obtain its requested orders occurred when Mr. Schulke, the Special Attorney named in the application, presented the Court with an application , a supporting affidavit of a special agent of the Bureau of Alcohol, Tobacco and Firearms, United States Treasury Department, and two proposed orders which purported to authorize the use of a pen register device.

None of the papers filed in connection with the government's first application filed with this Court, however, made reference to any statutory or rule authority to support the issuance of any order.

This Court at that time requested that the government prepare and file in camera a memorandum of law in support of its original application. Mr. Schulke submitted a short memorandum

of law which candidly stated that "the United States recognizes that no specific statutory authority exists authorizing such devices." The government suggested in its original memorandum that the trilogy of Osborn v. United States, 385 U.S. 323 (1966); Berger v. New York, 388 U.S. 41 (1967); and Katz v. United States, 389 U.S. 347 (1967) made it clear that "the technical requirements of Rule 41 would not be applied to prohibit a sophisticated investigative technique merely because Rule 41 was drafted in terms of physical, rather than electronic, evidence."

The government stated in its first brief that its first application had been drafted in a manner "similar" to the manner in which an application under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Act of June 19, 1968, Pub. L. No. 90-351, 82 Stat. 197, must be drawn. The government argued that the form of its original affidavit and the procedure which it allegedly was following had been approved in United States v. Brick, (8 Cir. 1974) 502 F. 2d 219 and in United States v. John, (8 Cir. 1975) 508 F. 2d 1134.

After receipt of the government's first legal memorandum we invited Mr. Schulke to chambers to discuss the legal questions which had not been discussed in the government's brief. Both he and Michael DeFeo, Attorney in Charge, Kansas City Field Office, Organized Crime and Racketeering Section, Department of Justice, accepted our invitation and conferred informally with the Court. The Court advised government counsel that it did not read the cases cited in its original legal memorandum as authorizing the use of a pen register device unless such device was authorized as an incident of an order authorizing a wire interception under the exacting procedures mandated by Title III.

We frankly stated to government counsel that its original memorandum of law did not, in our judgment, appropriately cite or rely upon any source to establish this Court's power, jurisdiction or authority to issue the orders requested. Government counsel's attention was directed to Weinberg v. United States, (2 Cir. 1942) 126 F. 2d 1004, as an example of a case in which a particular district judge had attempted to enter an order which varied from the authority conferred by the then existing law.

We advised counsel that we had not had time to independently research the question and requested the submission of further legal authority. We asked whether the Department of Justice in Washington had briefed the question and were advised that the question had not been briefed in Washington and that no assistance could be obtained from that source. Mr. DeFeo advised the Court, however, that he agreed that the original memorandum of law submitted did not fully cover all of the questions presented and that a more adequate memorandum of law would promptly be presented to the Court.

On November 17, 1975, instead of submitting a more adequate memorandum of law as indicated, Mr. Schulke wrote the Court a letter in which he stated that the government had decided to withdraw its original application for a pen register device that had first been presented to this Court on November 3, 1975. Mr. Schulke closed his letter by stating "since this matter has been withdrawn, the government therefore requests return of its application, affidavits and two proposed orders which are presently in your custody." We immediately complied with the government's request and returned to Mr. Schulke the documents requested.

The papers presently before the Court establish that after the government withdrew its original application presented to this Court, it thereafter presented an application for substantially the same orders, purportedly invoking power conferred by Rule 41, F. R. Cr. P., to Chief Magistrate Hamilton. Chief Magistrate Hamilton, however, entered an order, together with a short memorandum opinion, which denied that application. Chief Magistrate Hamilton concluded that the application, as presented, did not fall within the purview of Rule 41, F.R. Cr. P., and that, therefore, a conventional search warrant authorized by that rule could not be issued under the circumstances. He further concluded that he did not believe that he had authority under law to enter the orders presented with the application. The requested orders, of course, involved substantial modification of the warrant procedures mandated by Rule 41.

Sometime after Judge Hamilton's refusal to issue the requested order, the government indicated that it wanted to make a second application to this Court. We reminded Mr. Schulke that Mr. DeFeo had indicated that the only brief which the government had ever presented to this Court was not adequate to support the government's application and that the government should present a supplemental brief with its second application to this Court which would discuss all questions of law presented.

The government presented its second application, together with its new brief, on December 3, 1975. When it became apparent on December 4,1975 that docket complications would prevent immediate consideration of the second application within the near foreseeable future, the Court directed Mr.

Schulke to file all papers under seal with the Clerk so that the Court could, when time permitted, consider the government's second application and new brief.

Consideration of the government's new brief established that it was necessary to conduct independent research in regard to the questions presented. We find and conclude that this Court does not have jurisdiction or authority to issue the requested orders for reasons we shall state.

II.

Both of the government's applications made to this Court and the application made to Chief Magistrate Hamilton recognize that "the propriety of [pen register] use depends on compliance with the Fourth Amendment."[2] The government's original application presented to this Court was based on the notion that it did not need to identify any statute or rule of court to support its request that this Court design some sort of ad hoc procedures which could be said to satisfy the requirements of the Fourth Amendment. When this Court requested the government to present legal authority to support its position and to have the benefit of the views of the Department of Justice in Washington, the government withdrew its original application.

The government then presented a similar application to Chief Magistrate Hamilton, purportedly pursuant to power and jurisdiction authorized by Rule 41, F.R. Cr. P. In that separate proceeding, the government unsuccessfully attempted to satisfy the requirements of the Fourth Amendment by attempting to have Chief Magistrate Hamilton make some sort of an ad hoc modification of the express requirements of Rule 41 in order that the subjects of the investigation would be deprived of the safeguards accorded all persons against whom warrants may

be issued in accordance with that Rule. Chief Magistrate Hamilton refused to make the modification requested by the government.

In making its second application to this Court, the government concedes that Chief Magistrate Hamilton has properly refused to issue its requested order under Rule 41. The government has also belatedly conceded in its new brief that it cannot put its finger upon the existence of any specific statutory authority or rule upon which its requested orders may be based. The government states its legal theory by saying that it "believes that the All Writs Act, 28 U.S.C. § 1651(a) provides authority for this Court to issue the requested order, particularly in view of the clear pronouncement in United States v. John that 'the propriety of their use depends upon compliance with the Fourth Amendment,' and the value of a detached antecedent judicial determination is evident before use of this type of device."

The government's attempted reliance upon dictum contained in United States v. Brick, 502 F. 2d 219 (8 Cir. 1974) and dictum quoted from United States v. John, 500 F. 2d 1134 (8 Cir. 1975) is untenable for the reason that in both those cases the Title III orders under consideration also authorized the use of a pen register in conjunction with the authorized wiretap. Indeed, Judge Heaney commenced his discussion of the pen register question in John with the factual recitation that "in conjunction with each order authorizing the interception of wire communicatio the district court issued an order authorizing the installation of a pen register on the telephones involved." [Emphasis ours]

While we quite agree that both Brick and John approved orders authorizing the use of a pen register device when issued

in conjunction with a Title III order authorizing the interception of wire communications, we are convinced that the language of those cases cannot be stretched to validate the issuance of some sort of an ad hoc order to authorize the use of a pen register device independent of a proper Title III application and order. Cf. Weinberg v. United States, (2 Cir. 1942) 126 F. 2d 1004.

Every court which has directly considered the question has had no difficulty whatever in concluding that Title III is broad enough to authorize the use of pen registers when an application for such authority is made in conjunction with an application for a wiretap authorized by Title III. Most all of the cases, as do Brick and John, involve factual circumstances under which the Title III application for an order authorizing electronic surveillance included a request for both a wiretap and a pen register device. Every attack upon the authorized use of a pen register device under those circumstances has been determined to be without merit. See, for example, United States v. Falcone, (3 Cir. 1974) 505 F. 2d 478, 482, cert. den. 420 U.S. 955 (1975), which goes so far as to hold that "an order permitting interception under Title III for a wiretap provides sufficient authorization for the use of a pen register, and no separate order for the latter is necessary. To say that, of course, is not to say that a court has power and jurisdiction to authorize the installation of a pen register independent of the authority to authorize electronic surveillance as provided in Title III.

We do not, however, have a Title III application before us. What we do have before us is an application for some sort of an ad hoc authorization of the use of a pen register device in connection with an investigation of a possible violation of a

statute which the Congress refused to include within the coverage of Title III. Indeed, we have an application which the government concedes is outside the coverage of Title III. The government's basic position in connection with its application is that in spite of the fact that the Congress did not include violations of §§ 7203 and 7262, Title 26, U.S.C., requiring the payment of a $500 special tax under the Federal Wagering Laws, within the coverage of Title III, the ancient All Writs Act nevertheless must be said to vest power and jurisdiction in a district court to design ad hoc procedures to authorize electronic surveillance in the form of the installation of a pen register device in connection with investigations of alleged violations of §§ 7203 and 7262. Indeed, the government's All Writs Act argument, if extended to its logical conclusion, would support the notion that all district courts have power and jurisdiction to authorize the use of pen register devices in connection with any investigation of any violation of the laws of the United States, regardless of the fact that the Congress may not have included the particular offense within the coverage of Title III.

The government's loosely-stated suggestion concerning "the value of a detached antecedent judicial determination" made in connection with the portion of its All Writs Act argument quoted above is more explicitly stated in connection with another matter on the same page of its new briefs. The government there suggests that it seeks what it calls "judicial guidance" in order that the agents of the Bureau of Alcohol, Tobacco and Firearms, United States Treasury Department, will obtain some sort of protection from the "dangers of possible civil and criminal liability under 18 U.S.C. §§ 2511 and 2520,

and the theory of Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971)."

Even if it could be assumed that the issuance of an order unauthorized by law may afford government agents some sort of a good faith defense in connection with civil or criminal proceedings which may be brought against them as provided in Title III, a question which we need not and do not answer, it should be obvious that basic questions of power and jurisdiction cannot be properly determined on the basis of trying to afford a government agent a defense in a civil or criminal action.[3] Questions of power and jurisdiction must be determined on the basis of Congressional action which has or has not been taken in regard to the subject matter of the particular question under consideration.

When the Congress enacted Section 2516, Title 18, U.S.C. of Title III it did not include the $500 special tax offense presently under investigation by ATF among the offenses for which the Attorney General, or any Assistant Attorney specially designated by him, may authorize an application to a federal judge to obtain an order authorizing or approving the interception of wire or oral communications in conformity with the detailed procedural requirements of Section 2518 of Title III.

Section 2516 did, on the other hand, expressly include Section 1955, Title 18, U.S.C,, (prohibition of business enterprises of gambling) within the coverage of Title III. Section 1955, however, defines an "illegal gambling business" to mean a "gambling business which . . . involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business and . . . has been or remains in substantially continuous operation for a period in excess of

thirty days or has a gross revenue of $2,000 in a single day." The Special Attorney who is attempting to get orders authorizing ATF agents to use a pen register frankly advised the Court that ATF did not have any evidence which would support a finding of probable cause that Section 1955 is being violated. Section 2516, Title 18, U.S.C., does not authorize the Attorney General, or any Assistant Attorney designated by the Attorney General, to authorize an application to any federal judge for an order approving the interception of wire or oral communications in connection with any law relating to gambling, excepting only investigations for violations of Section 1955, Title 18, U.S.C. Section 1955, on its face, requires that the government must have probable cause to sustain a finding that the suspected gambling business under investigation is being conducted by five or more persons in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

While we quite agree with Chief Magistrate Hamilton's apparent conclusion that the data submitted by the Special Attorney and the ATF agent may be sufficient to support a finding of probable cause that the three individuals mentioned in those papers may be violating Section 7203 and 7262, Title 26, U.S.C., we are required to find and conclude under the circumstances that the government does not even contend that it has presented sufficient data to sustain a finding of probable cause in connection with any suspected violation of Section 1955, Title 18, U.S.C.

When this Court requested the government to present a new brief to support what to this Court was a novel assertion of power, the government withdrew its application. The government's new brief added very little to its old brief other than the statement of its concession that Chief Magistrate Hamilton properly refused to make some sort of an ad hoc modification of the express requirements of Rule 41 in a manner which would prevent revelation of the fact a pen register had been installed on the various telephones mentioned in the ATF affidavit.

The government's new brief, of course, was written in obvious recognition of the fact that its second application to this Court would need to be based upon some legal authority other than Rule 41. The government's reliance upon the notion that power and jurisdiction is somehow vested in this Court under the All Writs Act, 28 U.S.C. § 1651(a), must be considered in light of the government's elimination of any other source of power and jurisdiction except that which it, at long last, contends is vested by the All Writs Act. The government's contention is obviously untenable.

III.

The present form of the All Writs Act which presently appears as Section 1651(a) had its origin in the Judiciary Act of 1789. That section grants broad power to the Supreme Court and to "all courts established by an act of Congress" to issue common law writs of certiorari, prohibition, mandamus, injunctions pending appeal, and every other writ "necessary or appropriate in aid of [the] respective jurisdictions" of the particular federal court involved.

Familiar principles stated in cases such as Brittingham v. U.S. Commissioner of Int. Rev., (5 Cir. 1971) 451 F. 2d 315, 317, need only to be stated in order to demonstrate that the government's All Writs Act contention is untenable. That case, as do many other cases, cites the leading Supreme Court and still other cases to support its statement of the following applicable general principles:

> It is settled that this section known as the All Writs Act, by itself, creates no jurisdiction in the district courts. It empowers them only to issue writs in aid of jurisdiction previously acquired on some other independent ground. [Emphasis ours] [Citations omitted]

This Court does not have any independent jurisdictional ground over the investigation which the government seeks to make of alleged violations of persons who may have willfully failed to file returns, keep records, or supply information to the United States Treasury in alleged violation of Sections 7203 and 7262, Title 26, U.S.C. Nor does the All Writs Act vest this Court with any independent jurisdictional power to design ad hoc procedures to authorize the use of a pen register device in connection with investigations of alleged offenses outside the scope of Title III. We accordingly find and conclude that under the general principles stated, the All Writs Act may not properly be said to vest this Court with power and jurisdiction to issue the order requested.

IV.

The government's suggestions about its need for "judicial guidance" and "antecedent judicial determination" erroneously assume the existence of judicial power which is nonexistent. That assumption is predicated upon the notion that the judicial branch may properly construe legislation passed by the Congress

in accordance with the policies a particular judge would have favored or opposed, had he been a member of Congress rather than a judge.

Established principles of statutory construction require courts to recognize that Congress does not legislate in a vacuum; Congressional legislation must be viewed in light of earlier legislation enacted in connection with the same subject matter and court decisions which have definitely determined the meaning and scope of that earlier legislation. Of particular significance, so far as Congressional action in regard to electronic surveillance is concerned, are the cases which considered whether pen register devices were within the coverage of Section 605, Title 47, U.S.C, which banned all forms of electronic surveillance. See Nardone v. United States, 302 U.S. 379 (1937); Weiss v. United States, 308 U.S. 321 (1939); Nardone v. United States, (Nardone II), 308 U.S. 338 (1939); and Benanti v. United States, 355 U.S. 96 (1957). Every case which considered the precise question concluded that pen registers were embraced in the prohibition of Section 605. See Chief Judge Campbell's opinion in United States v. Guglielmo, (N.D. Ill. 1965) 245 F. Supp. 534, affirmed sub nom. United States v. Dote, (7 Cir. 1966) 371 F. 2d 176, (opinion by Chief Judge Hastings), and United States v. Caplan, (E.D. Mich. 1966) 255 F. Supp. 805 (opinion by then District, now Circuit Judge McCree). We believe that it must be assumed that Congress knew that pen register devices were included within the coverage of Section 605 of the Communications Act of 1934 (47 U.S.C. § 605), and that it knew that unless the pen register was taken out of the ban of Section 605, the use of such a device would still be prohibited. Section 803 of the Omnibus Crime Control and Safe Streets Act amended Section 605 to clearly reflect that all electronic surveillance is now to be

or to make arrests for offenses enumerated in this chapter, and

governed by Title III. Senate Report No. 1099, reprinted 2 U.S.C. Code Congressional and Administrative News, 90 Cong., 2d Sess. at 2196, stated:

> Section 803.--This section amends section 605 of the Communications Act of 1934 (48 Stat. 1103, 47 U.S.C. sec. 605 (1958)). This section is not intended merely to be a reenactment of section 605. The new provision is intended as a substitute. The regulation of the interception of wire or oral communications in the future is to be governed by proposed new chapter 119 of title 18, United States Code.

United States v. United States District Court, 407 U.S. 297 (1972) and Gelbard v. United States, 408 U.S. 41 (1972) also reflect the fact that the Congress enacted a comprehensive and all-inclusive system of regulating all electronic surveillance by Title III of the Omnibus Crime Control Act. Gelbard, for example, contains the following summary of that Act:

> In Title III, Congress enacted a comprehensive scheme for the regulation of wiretapping and electronic surveillance. See United States v. United States District Court 407 U.S. 297, 301-309. Title III authorizes the interception of private wire and oral communications, but only when law enforcement officials are investigating specified serious crimes and receive prior judicial approval, an approval that may not be given except upon compliance with stringent conditions. 18 U.S.C. §§ 2516, 2518 (1)-(8). If a wire or oral communication is intercepted in accordance with the provisions of Title III, the contents of the communication may be disclosed and used under certain circumstances. 18 U.S.C. § 2517. Except as expressly authorized in Title III, however, all interceptions of wire and oral communications are flatly prohibited. Unauthorized interceptions and the disclosure or use of information obtained through unauthorized interceptions are crimes, 18 U.S.C. § 2511(1), and the victim of such interception, disclosure, or use is entitled to recover civil damages, 18 U.S.C. § 2520. Title III also bars the use as evidence before official bodies of the contents and fruits of illegal interceptions, 18 U.S.C. § 2515, and provides procedures for moving to suppress such evidence in various proceedings, 18 U.S.C. § 2518 (9)-(10). [408 U.S. at 46]

We recognize, of course, that the concurring and dissenting opinion in Giordano, 416 U.S. at 548, suggested, by way of dictum,

violation of this subsection; or

that pen registers are not governed by Title III:

> This conclusion rests on the fact that the device does not hear sound and therefore does not accomplish any "interception" of wire communications as that term is defined by 18 U.S.C. §2510(4)-- "the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device" (emphasis added). [Id at 553]

We note that the term "contents," as quoted in Giordano is defined in Title III to include not only conversation, but also "any information concerning the identity of the parties to such communication or the existence . . . of that communication." 18 U.S.C. § 2510(8). The legislative history of that section states that:

> Paragraph (8) defines "contents" in reference to wire and oral communication to include all aspects of the communication itself. No aspect, including the identity of the parties, the substance of the communication between them, or the fact of the communication itself, is excluded. The privacy of the communication to be protected is intended to be comprehensive. [Emphasis ours] [2 U.S. Code Cong. & Admin. News, 90th Cong., 2d Sess. (1968) p. 2179]

Mr. Justice Powell in his concurring and dissenting opinion in Giordano quoted that portion of S. Rep. No. 1097, 90th Cong., 2d Sess. (1968), which stated that "the use of a 'pen register,' for example would be permissible." The substance of that language in the Senate Report had its origin in the last sentence of footnote 10 on page 662 of an article published in 43 Notre Dame Law Review 657 (1968), by G. Robert Blakey and James A. Hancock entitled "A Proposed Electronic Surveillance Control Act." Professor Blakey has frequently been noted to have been the primary author of Title III. See United States v. Giordano, 416 U.S. 505, 517, n.5, 526, n. 16 (1974). Footnote 10 of Professor Blakey's law review article, however, specifically added a "But see" citation of United States v. Doto, 371 F. 2d 176 (7 Cir. 1966). That case, of

course, is the leading case which held that a pen register device was within the coverage of Section 605.

The language of Title III, as enacted by the Congress, does not, in our judgment, reflect any acceptance of Professor Blakey's law review suggestion that "the proposed legislation is not intended to prevent the tracing of phone calls by the use of a 'pen register'' -- a device used to record the number dialed from a given phone." While we quite agree with the majority opinion's statement in Giordano that Title III of the Omnibus Crime Control and Safe Streets Act of 1968 "is not as clear in some respects as it might be," [416 U.S. at 515], we are also convinced that the legislative history is equally ambiguous and that "this is a case for applying the canon of construction of the wag who said, when the legislative history is doubtful, go to the statute" Greenwood v. United States, 350 U.S. 366, 374 (1956), (per Mr. Justice Frankfurter),

It is for this reason that we look to the statute as enacted by the Congress, rather than to the doubtful language of the Senate Report, as that language was borrowed from a law review article.[4] It is clear that the language of Title III comprehends all forms of electronic surveillance, and the orders which the government seeks cannot be obtained independent of the procedures contained therein. We cannot believe from the language of the new Act that the Congress intended that an investigative tool as useful as a pen register device was to remain within the ban and coverage of old Section 605 and that a properly authorized application could not be made for an order authorizing the use of a pen register device in conjunction with an order authorizing the interception of other oral or wire interceptions in accordance with Title III.[5]

V.

Independent research, made necessary by the superficial briefs submitted by the government in connection with the application involved in this case, reveals that this case is not the first case in which the government has attempted to secure ad hoc orders in connection with electronic surveillance techniques which were not expressly authorized by Title III. Application of United States, (9th Cir. 1970) 427 F. 2d 639, shows that the government attempted to convince Chief Judge Foley of the District of Nevada that he should, in connection with a Title III application seeking authority to intercept wire communications of particular named individuals, also issue a second order, not then authorized by Title III, to direct the officers of the Central Telephone Company of Nevada to serve and assist the Federal Bureau of Investigation in carrying out the interception applied for by the government.

Unlike this case, the procedures followed in Application of the United States resulted in Judge Foley having the benefit of something more than the government's ex parte presentation. After the benefit of an in camera hearing, and after consideration of the legal authorities presented by counsel for the telephone company, Judge Foley refused to issue the requested order, concluding that Title III did not expressly "authorize a judge to compel a communication carrier to serve and assist the Federal Bureau of Investigation in carrying out the interception of wire communications applied for by the government and approved by a court." (Id at 640-41). Judge Foley also concluded that "in view of this lack of authority, if the proposed order were signed and the company elected to comply therewith, the company and employees would be subject to prosecution for a gross misdemeanor under Nevada law, namely, N.R.S. 200.610-200.690." (Id at 641)

proving the interception, or a Federal agency having responsibility [illegible]

The government appealed Judge Foley's refusal to issue the requested order.[6] The Ninth Circuit found it necessary to decide only the questions of (1) whether the order denying the requested application was subject to appeal; and (2) "Did the district court have authority, in the exercise of its discretion, to order the company to cooperate in the interception of wire communications, assuming approval of the proposed interception were granted the Government?" (Id at 641)

Doubts were resolved in favor of appellate jurisdiction in light of the Ninth Circuit's conclusion, (Id 642), that "there is a substantial public interest in obtaining an early and authoritative determination of the unique and important questions presented on the merits, not only for the purpose of this case, but also for the general guidance of federal law enforcement agencies and, in the event amendatory legislation may be sought, for the assistance of the Congress."[7]

In Application of United States, as in this case, the government acknowledged "that Title III of the Act contains no specific provision . . . conferring . . . power" to issue the order requested of Judge Foley. (Id 642). The government contended that power and jurisdiction to issue the requested orders nevertheless could be based upon either the ancient principle of posse comitatus or upon the All Writs Act.[8] The Ninth Circuit concluded that neither notion could be relied upon to sustain the jurisdiction and power of the district court to issue the requested order. For, the Ninth Circuit could not find "outside Title III, any district court authority, statutory or inherent, for entry of such an order." (Id 644).

The Ninth Circuit considered it important "for the general guidance of federal law enforcement agencies" to set forth the

considerations which control the construction of statutes which permit the authorization of electronic surveillance. That court correctly anticipated the Supreme Court's later opinion in Gelbard v. United States, supra, by holding that:

> Title III ... purports to constitute a comprehensive legislative treatment of the entire problem of wiretapping and electronic surveillance, complete with extensive introductory Congressional findings. The provisions contained in Title III state, in precise terms, what wiretapping and electronic surveillance is prohibited, and what is permissible. As to the latter, meticulous provision is made with respect to the necessity and manner of obtaining prior or subsequent judicial approval, the use which may be made of intercepted information, the way in which aggrieved persons may test the validity of the interception, and the collection and transmission to Congress each year of information concerning such activity. [427 F. 2d at 643]

The court stated and applied familiar principles applicable to this case when it added that:

> In view of the breadth and apparent selfsufficiency of this general statute, and the total absence of any provision even hinting that the court is to have authority to enter such a unique order as the Government here seeks, we think the existence of such authority is not lightly to be implied from the Act. Nor do we find any provision in the Act, or in the history of its enactment, which points in the direction of implied authority. Quite to the contrary, consideration of the constitutional significance of the legislation, the relevant provisions of the Act, and the legislative history tend in the opposite direction. [Id. 643]

The court added and applied still another familiar rule of statutory construction which comes into play where Constitutional considerations lurk close to the surface of a particular statute. It stated that:

> Title III deals with a subject which directly affects the right of privacy in the matter of telephone communications, a right protected under the Fourth Amendment. See Katz v. United States, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed.2d 576 (1967). If the Act is to survive a constitutional challenge, a question which we do not here reach, it can only do so by giving the Act as limited a construction as is warranted by the language used. The construction which the Government would give Title III, however, whereby an important judicial power not expressly provided for, would be implied, manifests not a limited, but an expansive, reading of the Act. (Id 643)

For all the reasons stated, we expressly refuse to issue the orders requested by the government. We are convinced that Congress has not conferred power and jurisdiction on this Court to authorize the use of an electronic surveillance device in the form of a pen register in connection with the investigation of an offense admittedly not within the coverage of Title III. We refuse the government's request that we issue orders which neither the Congress nor any Rule of Criminal Procedure has authorized.

VI.

When the pending application was presented to this Court the first time, we made inquiry of the Special Attorney whether we could obtain the views of the Department of Justice in Washington. We were advised that this was impossible and that, as a matter of fact, the Special Attorneys in this district would not know whether their superiors in Washington may or may not agree with the theories presented to this Court until this Court had indicated its view under the circumstances.

We suggested then and reiterate now that there ought to be a better way to test the legal questions presented. It is obvious that a test case, which would reflect the considered and official view of the Department of Justice in Washington, could be prepared and presented in order that a final definitive decision could be obtained upon which a judgment could be made in regard to whether additional Congressional authority should be sought under the circumstances.

This Court, unlike the courts involved in Application of the United States, has been forced to conduct its own independent research in connection with what it deems to be an important question which could have a broad effect on the administration of federal criminal justice. We do not believe

carrier, landlord, custodian or other person ... and technical assistance necessary to

that such cases should be presented to a busy district court on an ex parte basis unless the government, acting with the official approval of the Department of Justice in Washington, is prepared to assure the Court that it has cited all cases which have dealt with the questions presented in all federal courts throughout the country.

The government, in apparent anticipation of the possibility of seeking appropriate appellate review, if eventually authorized in Washington, stated in one of its briefs that "if this Court determines that it lacks jurisdiction to authorize the use of a pen register device that has been requested by the Government's application, the Government would then ask the Court to make a finding by written order as to the lack of jurisdiction question and as to whether the Government has sufficient probable cause to justify the pen register device concerning the criminal matter under investigation." The orders we will enter will comply with that request. We believe, however, consistent with the practice followed in Application of the United States, supra, and that followed by Chief Magistrate Hamilton, that all papers other than this memorandum opinion and the orders entered in connection therewith should be placed under seal until further order of this Court or whatever appellate court which may later entertain jurisdiction under the circumstances.

For the reasons stated, it is

ORDERED (1) that the orders requested in the government's application should not and will not be issued. The government's requests in that regard are expressly denied. It is further

ORDERED (2) that the government has not established, indeed, it has not even attempted to establish, probable cause to

support the authorization of the use of a pen register device in connection with the investigation of any offense within the coverage of Title III of the Omnibus Crime Control Act. It is further

ORDERED (3) that the establishment of probable cause in connection with the investigation identified in the government's application, presently being conducted by the Bureau of Alcohol, Tobacco and Firearms, United States Treasury Department, is immaterial for the reason that no jurisdiction, power or authority, other than Title III has been conferred upon this Court by Act of Congress or Rule of the Supreme Court of the United States to issue the orders requested in the government's application. For purposes of possible appeal, however, we state our agreement with Chief Magistrate Hamilton's conclusion that probable cause, in the abstract, could be said to be established by the government's application and supporting affidavits in regard to an offense not covered by Title III. It is further

ORDERED (4) that all papers filed in connection with the government's application, excepting only this memorandum opinion and the orders hereby entered, shall be retained by the Clerk under seal and protective order until further order of this Court or of an appropriate appellate court. The Clerk shall, of course, promptly comply with the order of any appellate court should the government seek appropriate appellate review. The Clerk of this Court shall also advise the Clerk of the Court of Appeals or of any other appellate court of the protective order which has been entered by this Court, should the government seek appropriate appellate review. We trust that all appellate courts will enter any further protective orders which may be deemed appropriate under the circumstances.

Kansas City, Missouri
January 19, 1976

District Judge

(10) (a) Any aggrieved person in any trial, hearing, or proceed

FOOTNOTES

1. [Page 1]

A.T. & T. has apparently recommended to all Bell Telephone subsidiaries that company participation in a pen register device installation is forbidden as a matter of company policy unless such installation will have been authorized pursuant to "the safeguards of the federal wiretap statutes, 18 U.S.C. § 2510, et seq." See In re. Joyce, (5 Cir. 1975) 506 F. 2d 373, 375. We have not been advised by the government whether Southwestern Bell Telephone Company has adopted the A.T. & T. "recommendation."

2. [Page 6]

Footnote 4 of the dissenting opinion in United States v. Giordano, 416 U.S. 505, 554 (1974), suggests that the government may have argued in that case that "the use of a pen register may not constitute a search within the meaning of the Fourth Amendment." It is clear that no such argument is presented in this case. The government implicitly concedes in this case that the requirements of the Fourth Amendment must be satisfied, else it would not have presented its two applications to this Court and its application to Chief Magistrate Hamilton to issue a "modified" Rule 41 search warrant. It is therefore clear that, contrary to what the government may have argued in Giordano, the government's applications to this Court are based upon its recognition that the requirements of the Fourth Amendment must be satisfied. Such a view is, of course, consistent with Katz v. United States, 389 U.S. 347 (1967), and with the recent Fifth Circuit case, United States v. Holmes, (5 Cir. 1975) ___ F. 2d ___, 18 Cr. L. R. 2114, decided October 8, 1975, but not yet officially reported, which concluded that the attachment of a hidden electronic "beeper" on an automobile was a search within the meaning of the Fourth Amendment in that a motorist parking his car in a public place can not be considered as losing his reasonable expectation against that kind of government electronic surveillance. DiPiazza v. United States, (6 Cir. 1969) 415 F. 2d 99, 103-104, involving long distance toll records kept by the telephone company in the usual course of business, concluded that "one who uses a telephone to make long distance calls is not entitled to assume that the telephone company will require a warrant before submitting its records in response to an IRS summons."

The government's position in this case reflects its apparent recognition that reasonable expectations of privacy in regard to the installation of a pen register device to record all telephone calls is a search which is more comparable to the installation of an electronic "beeper" than to the production of copies of the long distance toll charges, the originals of which every telephone subscriber regularly receives with his monthly telephone bill.

(2) In January of each year the Attorney General, an Assistant

FOOTNOTES

3. [Page 10]

It should be noted that the government's attempt to immunize its agents from civil and criminal liability under 18 U.S.C. §§ 2511 and 2520 is inconsistent with its implicit argument that pen registers are not governed by Title III procedures. Any liability under Sections 2511 and 2520 must be predicated on "interceptions" of wire or oral communications in violation of the procedures mandated in Title III. If, as the government implicitly contends, the use of a pen register device is not deemed an "interception" under the definition in Title III, and therefore could be authorized independently of Title III procedures, then Sections 2511 and 2520 would have no applicability and could not be invoked in the first place. Moreover, the order which the government seeks would seemingly afford little protection to those agents because Title III procedures have not been followed here and could not be followed under the factual circumstances involved in this proceeding.

4. [Page 17]

We are, of course, familiar with the Law Review Note entitled "The Legal Constraints Upon the Use of the Pen Register as a Law Enforcement Tool," 60 Cornell L. Rev. 1028 (1975), apparently written by one of Professor Blakey's law student proteges. That note somewhat presumptiously suggested that "the Supreme Court twisted the meaning of section 605 in order to cover a criminal law enforcement context" [Id at 1032], and that the decisions made by other courts, which he concedes are against his novel view, were reached only as a result of judges' predilection to forego "a proper statutory analysis in their willingness to twist the statute and thereby find it applicable."

It is clear that the author of the Note concedes that all pre-1968 cases, the date of Title III's enactment, concluded that pen register devices were within the coverage of Section 605. And in regard to the cases decided after Congress enacted Title III, it is stated that: "With respect to section 605 subsequent to 1968, lawyers and judges alike have, for the most part, considered the present section 605 to be no more than a modification of the prior provision and therefore continue to accord the pen register the same treatment as that found in pre-1968 cases," (Id at 1035) and that: "The almost uniform result in the cases that have considered section 605 has been to curtail the use of pen registers." (Id at 1036)

FOOTNOTES

4. [Continued]

We do not believe that the teaching of the cases, either before or after Title III's enactment, can properly be disregarded. It is simply no answer to say, as the student author suggests, that the cases should be ignored because "the policy approach apparently chosen by the courts to deal with pen registers reflects a generalized distaste for wiretaps" (Id at 1037-1038). We simply cannot accept the notion that the judges who reached conclusions consistently contrary to that so zealously advocated by the author of the Note did so by having "grasped at any available argument to support their disposition and have accordingly created questionable precedents." (Id at 1038)

Rather, we are convinced that familiar principles require that we conclude that Congress was familiar with and recognized the impact of the pre-1968 Section 605 pen register cases. We are also convinced that the post-1968 cases rest on the soundly reasoned basis that courts must apply what Congress said in Title III, rather than attempt to rely upon a cryptic language in a law review article which happened to find its way into a Senate Report.

5. [Page 17]

The effect of our decision does not suggest that pen register devices may not properly be authorized by law or that their use is to be discouraged. Pen register devices, by their very nature, constitute a lesser intrusion into the privacy of an individual than wiretaps. To say that the minimal intrusion may be authorized only by the procedures mandated for the maximum intrusion does not mean that a court should always authorize the maximum intrusion simply because that tool is avilable, or that minimal intrusions are to be discouraged.

We believe that the Congress placed the duty upon a district judge to whom an application for a Title III authorization to intercept is presented to give appropriate consideration to minimizing the intrusion into legitimate activity by requiring in section 2518(5) that "every order and extension thereof shall contain a provision that the authorization to intercept . . . shall be conducted in such a way as to minimize the interception of communications not otherwise subject to this Chapter . . ." It may well be that a Title III order should, in the first instance, in a particular case, consistent with § 2518(5), permit only the installation of a pen register. We are not required, however, to reach that question by the government's application in this case because we do not have a proper Title III application before us.

5. [Continued]

The Congress, by its enactment of Title III, anticipated that such questions would arise primarily under circumstances in which the government sought a Title III authorization for both a wiretap and a pen register. The judgment of Congress, of course, is controlling.

6. [Page 19]

The official report of Application of United States, supra, lists Michael DeFeo, U.S. Department of Justice, Washington, D.C., as one of the government counsel for the appellant. We do not jump to the conclusion that Mr. DeFeo was necessarily familiar with the existence of that case simply because his name apparently appeared on the brief. There is the possibility that Mr. DeFeo told Mr. Schulke about the case and that Mr. Schulke forgot about it. We have neither the judicial time nor inclination to make further inquiry into the matter. We do believe that something is amiss with Department of Justice procedures under which cases as close as Application of United States are not called to the court's attention in connection with an ex parte application which relies solely on the All Writs Act to support the power and jurisdiction of the district court. See Berger v. United States, 295 U.S. 78 at 88 (1935).

7. [Page 19]

It is interesting to note that Congress acted promptly in regard to the question decided in Application of United States. The decision in that case was handed down on May 19, 1970. The Congress promptly amended Section 2518(4) of Title III on July 29, 1970 by adding what is now paragraph (e) of that section by attaching that amendment as a rider on the District of Columbia Court Reform Act. See U.S. Code Congressional and Administrative News, 91st Cong., 2d Sess. (1970). p. 769 and 785.

8. [Page 19]

The government did not present its posse comitatus argument to this Court. It has apparently concluded that what the Ninth Circuit said about that notion in Application of United States was correct.

CHAPTER 119—WIRE INTERCEPTION AND INTERCEPTION OF ORAL COMMUNICATIONS

§ 2510. Definitions

As used in this chapter—

(1) "wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications;

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

(4) "intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire or oral communication other than—

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

(6) "person" means any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation;

(7) "Investigative or law enforcement officer" means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

(8) "contents", when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;

9) "Judge of competent jurisdiction" means—

(a) a judge of a United States district court or a United States court of appeals; and

(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire or oral communications;

(10) "communication common carrier" shall have the same meaning which is given the term "common carrier" by section 153(h) of title 47 of the United States Code; and

(11) "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

§ 2511. Interception and disclosure of wire or oral communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2) (a) (i) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication: *Provided*, That said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(ii) It shall not be unlawful under this chapter for an officer, employee, or agent of any communication common carrier to provide information, facilities, or technical assistance to an investigative or law enforcement officer who, pursuant to this chapter, is authorized to intercept a wire or oral communication.

(b) It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

§ 2512. Manufacture, distribution, possession, and advertising of wire or oral communication intercepting devices prohibited

(1) Except as otherwise specifically provided in this chapter, any person who willfully—

(a) sends through the mail, or sends or carries in interstate or foreign commerce, any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications;

(b) manufactures, assembles, possesses, or sells any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications, and that such device or any component thereof has been or will be sent through the mail or transported in interstate or foreign commerce; or

(c) places in any newspaper, magazine, handbill, or other publication any advertisement of—

(i) any electronic, mechanical, or other device knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications; or

(ii) any other electronic, mechanical, or other device, where such advertisement promotes the use of such device for the purpose of the surreptitious interception of wire or oral communications,

knowing or having reason to know that such advertisement will be sent through the mail or transported in interstate or foreign commerce,

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2) It shall not be unlawful under this section for—

(a) a communications common carrier or an officer, agent, or employee of, or a person under contract with, a communications common carrier, in the normal course of the communications common carrier's business, or

(b) an officer, agent, or employee of, or a person under contract with, the United States, a State, or a political subdivision thereof, in the normal course of the activities of the United States, a State, or a political subdivision thereof, to send through the mail, send or carry in interstate or foreign commerce, or manufacture, assemble, possess, or sell any electronic, mechanical, or other device knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications.

§ 2513. Confiscation of wire or oral communication intercepting devices

Any electronic, mechanical, or other device used, sent, carried, manufactured, assembled, possessed, sold, or advertised in violation of section 2511 or section 2512 of this chapter may be seized and forfeited to the United States. All provisions of law relating to (1) the seizure, summary and judicial forfeiture, and condemnation of vessels, vehicles, merchandise, and baggage for violations of the customs laws contained in title 19 of the United States Code, (2) the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from the sale thereof, (3) the remission or mitigation of such forfeiture, (4) the compromise of claims, and (5) the award of compensation to informers in respect of such forfeitures, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions of this section; except that such duties as are imposed upon the collector of customs or any other person with respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the provisions of the customs laws contained in title 19 of the United States Code shall be performed with respect to seizure and forfeiture of electronic, mechanical, or other intercepting devices under this section by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General.

2514. Immunity of witnesses

Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other idence by any witness, in any case or proceeding before any grand y or court of the United States involving any violation of this apter or any of the offenses enumerated in section 2516, or any spiracy to violate this chapter or any of the offenses enumerated section 2516 is necessary to the public interest, such United States orney, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify produce evidence subject to the provisions of this section, and on order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ound that the testimony or evidence required of him may tend to riminate him or subject him to a penalty or forfeiture. No such tness shall be prosecuted or subjected to any penalty or forfeiture or on account of any transaction, matter or thing concerning ich he is compelled, after having claimed his privilege against f-incrimination, to testify or produce evidence, nor shall testimony compelled be used as evidence in any criminal proceeding (except a proceeding described in the next sentence) against him in any rt. No witness shall be exempt under this section from prosecun for perjury or contempt committed while giving testimony or ducing evidence under compulsion as provided in this section.

§ 2515. Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

§ 2516. Authorization for interception of wire or oral communications

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—

(a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots);

(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), subsection (d), (e), (f), (g), (h) or (i) of section 844 (unlawful use of explosives), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1511 (obstruction of State or local law enforcement), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1955 (prohibition of business enterprises of gambling), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), sections 2314 and 2315 (interstate transportation of stolen property), section 1963 (violations with respect to racketeer influenced and corrupt organizations) or section 351 (violations with respect to congressional assassination, kidnaping and assault);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; or

(g) any conspiracy to commit any of the foregoing offenses.

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

§ 2517. Authorization for disclosure and use of intercepted wire or oral communications

(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

(4) No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

(5) When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

§ 2518. Procedure for interception of wire or oral communications

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing, or approving the interception of any wire or oral communication shall specify—

[See main volume for text of (a) to (c);]

An order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

(a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8) (a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge

issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7) (b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

§ 2519. Reports concerning intercepted wire or oral communications

(1) Within thirty days after the expiration of an order (or each extension thereof) entered under section 2518, or the denial of an order approving an interception, the issuing or denying judge shall report to the Administrative Office of the United States Courts—

(a) the fact that an order or extension was applied for;

(b) the kind of order or extension applied for;

(c) the fact that the order or extension was granted as applied for, was modified, or was denied;

(d) the period of interceptions authorized by the order, and the number and duration of any extensions of the order;

(e) the offense specified in the order or application, or extension of an order;

(f) the identity of the applying investigative or law enforcement officer and agency making the application and the person authorizing the application; and

(g) the nature of the facilities from which or the place where communications were to be intercepted.

(2) In January of each year the Attorney General, an Assistant Attorney General specially designated by the Attorney General, or the principal prosecuting attorney of a State, or the principal prosecuting attorney for any political subdivision of a State, shall report to the Administrative Office of the United States Courts—

(a) the information required by paragraphs (a) through (g) of subsection (1) of this section with respect to each application for an order or extension made during the preceding calendar year;

(b) a general description of the interceptions made under such order or extension, including (i) the approximate nature and frequency of incriminating communications intercepted, (ii) the approximate nature and frequency of other communications intercepted, (iii) the approximate number of persons whose communications were intercepted, and (iv) the approximate nature, amount, and cost of the manpower and other resources used in the interceptions;

(c) the number of arrests resulting from interceptions made under such order or extension, and the offenses for which arrests were made;

(d) the number of trials resulting from such interceptions;

(e) the number of motions to suppress made with respect to such interceptions, and the number granted or denied;

(f) the number of convictions resulting from such interceptions and the offenses for which the convictions were obtained and a general assessment of the importance of the interceptions; and

(g) the information required by paragraphs (b) through (f) of this subsection with respect to orders or extensions obtained in a preceding calendar year.

§ 2520. Recovery of civil damages authorized

Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person—

(a) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;

(b) punitive damages; and

(c) a reasonable attorney's fee and other litigation costs reasonably incurred.

A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or under any other law.

Rule 41. Search and Seizure

(a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a federal magistrate or a judge of a state court of record within the district wherein the property is located, upon request of a federal law enforcement officer or an attorney for the government.

(b) Property Which May Be Seized with a Warrant. A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense.

(c) Issuance and Contents. A warrant shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall designate a federal magistrate to whom it shall be returned.

(d) Execution and Return with Inventory. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The federal magistrate shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(e) Motion for Return of Property. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made

(f) **Motion to Suppress.** A motion to suppress evidence may be made in the court of the district of trial as provided in Rule 12.

(g) **Return of Papers to Clerk.** The federal magistrate before whom the warrant is returned shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the district court for the district in which the property was seized.

(h) **Scope and Definition.** This rule does not modify any act, inconsistent with it, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made. The term "property" is used in this rule to include documents, books, papers and any other tangible objects. The term "daytime" is used in this rule to mean the hours from 6:00 a. m. to 10:00 p. m. according to local time. The phrase "federal law enforcement officer" is used in this rule to mean any government agent, other than an attorney for the government as defined in Rule 54(c), who is engaged in the enforcement of the criminal laws and is within any category of officers authorized by the Attorney General to request the issuance of a search warrant.

§ 206. Carriers' liability for damages

In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

§ 501. General penalty

Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided in this chapter, by a fine of not more than $10,000 or by imprisonment for a term not exceeding one year, or both; except that any person, having been once convicted of an offense punishable under this section, who is subsequently convicted of violating any provision of this chapter punishable under this section, shall be punished by a fine of not more than $10,000 or by imprisonment for a term not exceeding two years, or both.

§ 605. Unauthorized publication or use of communications

Except as authorized by chapter 119, Title 18, no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee, his agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response to a subpena issued by a court of competent jurisdiction, or (6) on demand of other lawful authority. No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. No person having received any intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of such communication (or any part thereof) knowing that such communication was intercepted, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of such communication (or any part thereof) or use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. This section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication which is broadcast or transmitted by amateurs or others for the use of the general public, or which relates to ships in distress.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

FRANK R. NATOLI, being duly sworn deposes and says:

That on this 12th day of April, 1976, a true copy of the foregoing brief of appellant NEW YORK TELEPHONE COMPANY was delivered to the office of WILLIAM I. ARONWALD, Attorney in charge of United States Department of Justice, Joint Strike Force Against Organized Crime, at 1 St. Andrews Plaza, New York, New York.

Sworn to before me this
12th day of April, 1976.

Frank R. Natoli

FRANK R. NATOLI

Richard H Bynum

RICHARD H. BYNUM
Notary Public, State of New York
No. 03-0526610
Qualified in Bronx County
Commission Expires March 30, 1977